

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION**

**ANTHONY BROWN,**

**Plaintiff,**

**v.**

**Civil Action No. 5:24-cv-00152  
Hon. Frank W. Volk, Judge**

**BETSY JIVIDEN, et al.,**

**Defendants.**

**DEFENDANT NICK BURTON'S MOTION TO DISMISS  
PLAINTIFF'S FIRST AMENDED COMPLAINT**

**NOW COMES** Defendant Nick Burton ("Capt. Burton"), by counsel, Natalie C. Schaefer, Kimberly M. Bandy, and Shannon M. Rogers, and the law firm of Shuman McCuskey Slicer PLLC, and requests that Plaintiff's First Amended Complaint be dismissed against him pursuant to Rules 8 and 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.

Plaintiff's claims against Capt. Burton were filed outside the applicable statutes of limitations, and his Amended Complaint does not relate back to the initial Complaint. Plaintiff's initial Complaint was filed on March 26, 2024, just as the applicable two-year statute of limitations was expiring. (ECF No. 1). Captain Burton was not identified as a Defendant in the initial Complaint. On May 9, 2024, Plaintiff filed his First Amended Complaint which identified Capt. Burton for the first time. (ECF No. 23). The Amended Complaint is untimely and should be dismissed.

Additionally, pursuant to the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), the Plaintiff failed to exhaust all administrative remedies, thereby barring all claims. Plaintiff failed to

satisfy the requirements set forth by WVDCR policy and failed to exhaust all administrative remedies related to the assault on March 26, 2022.

Moreover, the Amended Complaint fails to allege any plausible claims against Capt. Burton because it contains no factual support for any claim against Capt. Burton.

Finally, Capt. Burton is entitled to qualified immunity with respect to the claims of constitutional violations, and under West Virginia law with respect to the negligence claims. Captain Burton submits his Memorandum of Law contemporaneously with this Motion in further support of the relief requested.

**WHEREFORE**, Capt. Burton requests that his Motion to Dismiss be granted, that the Amended Complaint be dismissed against him, with prejudice, and for such other and further relief as the Court may direct.

**NICK BURTON**  
**by counsel,**

/s/ Kimberly M. Bandy  
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**CERTIFICATE OF SERVICE**

The undersigned, counsel for Nick Burton, hereby certifies that on this 26<sup>th</sup> day of August, 2024, the foregoing *Defendant Nick Burton's Motion to Dismiss Plaintiff's First Amended Complaint* was electronically filed with the Clerk of the Court using the Case Management/Electronic Case Files (CM/ECF) system, which will send notification of such filing to current CM/ECF participants.

/s/ Kimberly M. Bandy

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